ORIGINAL

ORIGINAL

Supreme Court, U.S.
FILED
JAN 8 2003
CLERK

No. 02-829 (5)

IN THE

SUPREME COURT OF THE UNITED STATES

DISCOVER BANK,

Petitioner,

v.

JOHN SZETELA,

Respondent.

On Petition for a Writ of Certiorari to the California Court of Appeal, Fourth Appellate District

---

OBJECTION TO MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Brian R. Strange
Counsel of Record
Strange & Carpenter
12100 Wilshire Boulevard, Suite 1900
Los Angeles, California 90025
(310) 207-5055

Attorneys for Respondent.

RECEIVED
JAN 8 2003
OFFICE OE THE CLERK
SUPREME COURT, U.S.

7 pp

INTRODUCTION

Plaintiff/Respondent John Szetela hereby objects to the motion for leave to file brief *amici curiae* on behalf of the American Bankers Association, the American Financial Services Association, the Consumer Bankers Association, and the Chamber of Commerce of the United States. For the reasons set forth below, and because the proposed *amici's* motion is disfavored, this motion should be denied. See United States Supreme Court Rules, Rule 37.2(b).

OBJECTIONS TO ALLOWING THIS BRIEF *AMICI CURIAE* TO BE FILED

Respondent did not consent to allow the filing of the brief *amici curiae* for the simple reason that there is no need for an *amicus* brief, particularly on the limited issue of whether this Court should grant Discover Bank's ("Discover") petition for a writ of certiorari. As set forth in Rule 37.1 of the Rules of this Court, an *amicus curiae* brief that does not "bring[ ] to the attention of the Court relevant matter not already brought to its attention by the parties" "burdens the Court, and its filing is not favored." This brief *amici curiae* does not raise any new matter not already raised by the parties, and it should therefore

not be permitted to be filed.

Moreover, the proposed *amici* do not have a "substantial interest" in the outcome of this case. In Szetela v. Discover Bank, 97 Cal. App. 4th 1094 (2002), the California Court of Appeal considered the specific facts and circumstances of this case and held that the "no class action" provision in petitioner Discover Bank's ("Discover") arbitration clause is unenforceable under state law relating to the unconscionability of contracts. The California Court of Appeal decision does not stand for the proposition that arbitration agreements will not be enforced or that banks cannot include arbitration agreements in their consumer contracts. It only stands for the proposition that unconscionable agreements, including unconscionable arbitration clauses or portions thereof, will not be enforced. This has always been the law and is not changed as a result of the Szetela decision. Rather, the law is well-established that arbitration agreements are subject to ordinary state law defenses, including unconscionability. See Doctor's Associates, Inc. v. Casarotto, 517 U.S. 681 (1996). The proposed *amici* have never been justified in relying on their contrary interpretation of the Federal

Arbitration Act and other federal law. Therefore, they have no substantial interest in the "settlement" of this question, which has never been in dispute.

The proposed *amici* also do not have a substantial interest in being able to include unconscionable provisions in their arbitration agreements and then demanding enforcement of those unconscionable provisions "according to their terms." Neither the Federal Arbitration Act nor any other federal law requires enforcement of unconscionable arbitration clauses "according to their terms." Because the proposed *amici* have no substantial interest in this case, this motion should be denied.

CONCLUSION

For the foregoing reasons, this Court should deny this motion to file brief *amici curiae* in support of Discover's petition for a writ of certiorari.

Respectfully submitted,

By: _____

Brian R. Strange
Counsel of Record
Strange & Carpenter
12100 Wilshire Boulevard,
Suite 1900
Los Angeles, California 90025
(310) 207-5055

Counsel for Respondent.

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the county of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is:

12100 Wilshire Boulevard, Suite 1900
Los Angeles, California 90025

On January 6, 2003, I served the forgoing document, described as: **OBJECTION TO MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI [x] by placing** [ ] the original [x] a true copy thereof enclosed in sealed envelopes addressed as follows:

Alan S. Kaplinsky, Esq.
Mark J. Levin, Esq.
Ballard Spahr Andrews & Ingersoll, LLP
1735 Market Street, 51st Floor
Philadelphia, PA 19103

Robin S. Conrad, Esq.
National Chamber Litigation Center, Inc.
1615 H. Street, N.W.
Washington, D.C. 20062

John J. Gill, Esq.
American Bankers Association
1120 Connecticut Avenue, N.W.
Washington, D.C. 20036

John G. Roberts, Jr., Esq.
Catherine E. Stetson
Keith J. Benes
Hogan & Hartson L.L.P.
555 Thirteenth Street, N.W.
Washington, D.C. 20004

Joel A. Feuer, Esq.
Theodore J. Boutrous, Jr., Esq.
Gibson, Dunn & Crutcher LLP
333 South Grand Avenue
Los Angeles, CA 90071-3197

Barry L. Kramer, Esq.
Law Offices of Barry L. Kramer
6601 Center Dr. W. Suite 500
Los Angeles, CA 90045

VIA U.S. MAIL

As follows: I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with U.S. postal service on that same day with postage thereon fully prepaid at Los Angeles, California. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

Executed on January 6, 2003, at Los Angeles, California.

I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Jill Hood